(2)

No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-435

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the attempted arson of an income-producing property he owned was not punishable under 18 U.S.C. 844(i), which prohibits arsons of "any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of attempting to destroy by fire a two-unit apartment building, in violation of 18 U.S.C. 844(i). He was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. 1-4).

1. Petitioner, a member of the Chicago Fire Department, owned four buildings. He earned rental income from the buildings and treated them as business properties for tax purposes, claiming deductions for depreciation and expenses. One of these buildings was a two-unit apartment

building at 4530 South Union. The bottom floor was rented to a woman who occupied the premises sporadically in February 1983. The upstairs apartment was rented to a family of eight.[1] Tr. 20, 30, 98-103, 150, 156.

To avoid fines for housing code violations and the cost of making repairs to the building, petitioner hired Ralph Branch (who had recently been released from prison) to set fire to the building. When Branch asked petitioner how his tenants would escape the fire, petitioner replied, "* * * if they do they do, if they don't, they don't." Petitioner showed Branch how to start the fire by using a natural gas line in the basement (Tr. 31-36, 50).

In order to provide petitioner with an alibi, the arson attempt was scheduled for the evening of February 8, 1983, when petitioner was on duty at the fire station. The attempt failed, however, and petitioner demanded that Branch try again on February 10 with a can of gasoline petitioner provided (Tr. 38-46).

After meeting with petitioner, Branch reported the planned arson to the FBI and agreed to tape record a telephone conversation with petitioner. During the conversation, petitioner asked Branch if he was going to start the fire that evening, and Branch assured petitioner that he would. Petitioner then told Branch where he had placed the can of gasoline. Petitioner was arrested following the conversation, and the fire was never set (Tr. 46-50).

2. Prior to trial, petitioner moved to dismiss the indictment, alleging that there was no federal jurisdiction for the offense. The district court denied the motion on the ground that interstate commerce was affected because the building used natural gas supplied from other states. 563 F. Supp.

---

[1]The building was heated with natural gas, piped into Illinois from other states (Tr. 121-122).

1085 (N.D. Ill. 1983). The court also rejected, as did the court of appeals, petitioner's claim that apartment buildings are excluded from the statute. Both courts concluded instead that the building in question was a "business property." Accordingly, the court of appeals distinguished this case from *United States* v. *Mennuti*, 639 F.2d 107 (1981), in which the Second Circuit held that Section 844(i) does not apply to " 'dwelling houses which were not being used for any commercial purposes at all.' " Pet. App. A2, quoting 639 F.2d at 111-112. See also 563 F. Supp. at 1088.

3. There is no merit to petitioner's claim that Section 844(i) does not apply to attempted arson of apartment buildings. The plain language of the statute covers (emphasis added) "attempts to damage or destroy, by means of fire or an explosive, *any building*, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce * * *." In contrast to petitioner's cramped interpretation, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to [nonresidential buildings]." *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 3, quoting *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

Nor does the decision below conflict with either *United States* v. *Mennuti, supra*, or *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979). In *Mennuti*, the Second Circuit held that the statute did not apply to two private dwellings because only "business-related activities" satisfy the commerce element of Section 844(i). But unlike the dwellings in *Mennuti*,[2] the apartment building here was one

---

[2]In *Mennuti*, one of the dwellings was owned by Mennuti's wife and was the private residence of the Mennuti family. The other dwelling was a rental property that was owned by someone other than appellees Mennuti and Natale. Neither dwelling was a business property owned by the defendant, unlike the apartment building here. See 639 F.2d at 108 n.1.

of four income-producing business properties owned by petitioner. Petitioner deducted depreciation and expenses relating to these properties on his tax returns. And, he purchased "business" rather than "homeowner" insurance policies for the buildings (Tr. 150-154). Accordingly, as the court below concluded, this case is distinguishable from and does not conflict with *Mennuti.*

The claim of conflict with *Monholland* fares no better. In that case, the defendants blew up a pick-up truck that a state judge used for commuting to work. The Tenth Circuit held that Section 844(i) did not apply because the truck was not business property and did not affect interstate commerce. Obviously, *Monholland* has no bearing on the instant case, where both courts below determined that petitioner's rental properties were "business" properties.

Finally, petitioner contends (Pet. 7-9) that the use of interstate fuel does not bring "non-commercial residential property" within the ambit of Section 844(i). This argument is beside the point since the lower courts concluded that the apartment building was indeed commercial property. Accordingly, the question whether the use of interstate fuel can bring a private dwelling within the scope of the statute is not presented here.[3]

---

[3]See *United States* v. *Barton,* 647 F.2d 224, 231-232 (2d Cir.), cert. denied, 454 U.S. 857 (1981) (approving jury instruction that " '[a] building is used * * * in an activity [a]ffecting interstate commerce * * * if oil or gas moving in interstate commerce is used to heat the building' "); cf. *United States* v. *Schwanke,* 598 F.2d 575 (10th Cir. 1979); *United States* v. *Sweet,* 548 F.2d 198 (7th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12